

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Core Communications, Inc.	)	
	)	WC Docket No. 03-171
Petition for Forbearance Under	)	
47 U.S.C. § 160(c) from Application of	)	
the ISP Remand Order	)	

**COMMENTS OF PAC-WEST TELECOMM, INC.**

Pac-West Telecomm, Inc. ("Pac-West"), by its attorneys and pursuant to the Public Notice dated July 18, 2003, hereby provides its comments regarding the Petition for Forbearance from Application of the *ISP Remand Order*<sup>1</sup> by Core Communications, Inc. Pac-West agrees with Core that the Commission should forbear from enforcing the terms of the *ISP Remand Order*.

**I. STANDARD FOR FORBEARANCE**

Section 10 of the Communications Act provides that the Commission must forbear from applying any regulation or provision of the Act to a telecommunications carrier if the Commission determines that: (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are

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<sup>1</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, Order on Remand and Report and Order*, 16 FCC Rcd 9151 (2001), remanded, *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), cert. den. 538 U.S. \_\_\_\_ (May 5, 2003) ("*ISP Remand Order*").

not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such regulation or provision is consistent with the public interest.

In this case, forbearance is appropriate because enforcement of the *ISP Remand Order* is not necessary to achieve the goals stated when it was promulgated. As discussed below, the assumed circumstances under which the Commission felt action was necessary have turned out to not be true. Accordingly, enforcement of the *ISP Remand Order* is not necessary to ensure just and reasonable practices by carriers that provide service to Internet service providers (“ISPs”). Similarly, enforcement of the *ISP Remand Order* is not necessary for the protection of consumers. The matters addressed in the *ISP Remand Order* concerned compensation arrangements between carriers. If anything, enforcement of the *ISP Remand Order* harms consumers by effectively raising the rates they pay to obtain access to the Internet. Therefore, forbearance from enforcement of the *ISP Remand Order* would not harm consumers. Finally, it is clearly in the public interest to forbear from enforcing the *ISP Remand Order*. As discussed below, there is no statutory foundation for the *ISP Remand Order*. It is not in the public interest to enforce regulations that lack a statutory predicate, as the rules established in the *ISP Remand Order* do. Further, more than 30 state commissions had already ruled that the intercarrier compensation regime required by Section 251(b)(5) was appropriate for ISP-bound traffic. The Commission should return to the state of affairs that existed prior to adoption of the *ISP Remand Order* acknowledging the legal conclusions reached by those states.

## **II. THE ISP REMAND ORDER HAS NO STATUTORY FOUNDATION**

In particular, it is in the public interest to forbear from enforcing the *ISP Remand Order* because the Order has no statutory foundation. In April 2001, the Commission issued the *ISP Remand Order*, stating in part that traffic terminated to ISPs was not subject to the reciprocal compensation requirements of Section 251(b)(5) of the Telecommunications Act of 1996. The Commission ruled instead that Section 251(g) of the Telecom Act “carved out” certain types of traffic from the scope of Section 251(b)(5), including ISP-bound traffic. Asserting authority under § 251(g) to promulgate rules regarding intercarrier compensation for ISP-bound traffic, the Commission assembled an “interim” regime of rate caps, growth caps, and new market restrictions that radically reduced the compensation to local exchange carriers (“LECs”) for terminating calls to ISPs, and renders such compensation asymmetrical. The Commission acknowledged that there is no evidence that LECs incur lower costs for delivering calls to ISPs than to other end users. The Commission also made no finding that the reduced compensation scheme even covers LECs’ costs. Rather, the Commission justified its new rules as a “transition” to a zero-compensation “bill-and-keep” regime. The Commission, however, previously had found this zero-compensation regime unjust and unreasonable. Further, the Commission’s decision in the *ISP Remand Order* flatly contradicted the decisions of almost two-thirds of all state commissions, which already had ruled that ISP-bound traffic was subject to reciprocal compensation obligations.

In May 2002, the United States Court of Appeals completely rejected the Commission’s statutory analysis underlying the *ISP Remand Order*. The Court stated that “§ 251(g) is not susceptible to the Commission’s reading.” The D.C. Circuit also concluded that § 251(g) did not provide the authority claimed by the FCC for not applying § 251(b)(5) to ISP-bound traffic. Because the Commission “relied entirely on § 251(g)” for its new intercarrier compensation

regime, the panel remanded the Commission's decision to the agency for further proceedings. In short, the D.C. Circuit ordered the Commission to identify a different statutory basis for its interim intercarrier compensation regime if it wished to continue to assert that the rules applicable to Section 251(b)(5) were not applicable to ISP-bound traffic.

Those instructions were given to the Commission more than 15 months ago. The Commission still has not explained why ISP-bound traffic is not subject to Section 251(b)(5). Because the Commission has failed to respond to the mandate of the D.C. Circuit, it should recognize that the intercarrier compensation regime in the *ISP Remand Order* has no statutory foundation, and forbear from enforcing its terms.

### **III. THE ISP REMAND ORDER HAS NO FACTUAL FOUNDATION**

It is also in the public interest not to enforce the *ISP Remand Order* because the circumstances that the Commission thought it was addressing have turned out not to be true. For the same reasons, enforcement of the *ISP Remand Order* is not necessary to ensure just and reasonable practices by carriers that serve ISPs.

The *ISP Remand Order* ostensibly addressed “a need for immediate action with respect to ISP-bound traffic” by “seeking to remedy an exigent market problem” and to “curtail a pressing problem.” Although the FCC felt that the new interim compensation regime was necessary to prevent widespread “regulatory arbitrage” that it claimed existed prior to the *ISP Remand Order*, SBC Communications, Inc., the second-largest RBOC in the United States, serving more than 60 million access lines, decided not to adopt the interim compensation regime after it became effective.<sup>2</sup> Even though SBC prevailed at the FCC, SBC elected to maintain the status quo ante

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<sup>2</sup> See SBC Communications, Inc., Annual Report 2002, at 21 (Feb. 20, 2003) (“To date, none of our wireline subsidiaries have opted into the transition plan[.]”), [http://www.sbc.com/investor\\_relations/0,,136,00.html](http://www.sbc.com/investor_relations/0,,136,00.html).

rather than comply with the requirements of the new interim compensation regime. SBC's conduct with respect to the new interim compensation regime proves that the new compensation regime was not necessary.<sup>3</sup> Quite obviously, the "market problem" was neither "exigent" nor "pressing" for SBC. If SBC were in need of the relief offered by the FCC regime, SBC would have adopted the regime as soon as possible in 2001. SBC's conduct proves that the alleged conditions in the marketplace underlying the FCC action were not present in SBC territory. Given that the circumstances on which the *ISP Remand Order* was premised are not supported by the facts, the Commission should forbear from enforcing the *ISP Remand Order*.

#### **IV. PARTIAL FORBEARANCE WOULD ALSO BE APPROPRIATE**

For the reasons stated above, it is appropriate for the Commission to forbear from enforcing the *ISP Remand Order*. If the Commission declines to forbear from enforcing the Order in whole, it should consider forbearing from enforcing the Order in part. In particular, Pac-West urges the Commission to consider not enforcing the growth caps and new market restrictions in the *ISP Remand Order*. As numerous parties noted in the appeal before the D.C. Circuit, the growth caps and new market restrictions in the Order are discriminatory on their face.<sup>4</sup> Because the D.C. Circuit declined to review the merits of the intercarrier compensation regime, the appellants that challenged these aspects of the *ISP Remand Order* have been denied an adequate remedy. The Commission should recognize the fundamental unfairness of the intercarrier compensation regime with respect to the growth caps and new market restrictions, and correct the matter by forbearing from enforcing them.

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<sup>3</sup> Although SBC has recently attempted to adopt the intercarrier compensation regime of the *ISP Remand Order*, Pac-West asserts that SBC's election has come too late.

## V. CONCLUSION

For the foregoing reasons, the Commission should grant the Core Petition for Forbearance from enforcement of the *ISP Remand Order*. The Order has no statutory foundation, and it was premised on factual grounds that have turned out not to be true. If the Commission elects not to forbear from enforcing the entire Order, it should, at a minimum, forbear from enforcing the growth caps and new market restrictions.

Respectfully submitted,



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<sup>4</sup> See Brief of Carrier Petitioners and Supporting Intervenors, *WorldCom, Inc. v. FCC*, No. 01-1218 (No. 15, 2001) at 39-49.